BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC 20423

In the Matter of:	)	
	)	**STB Ex Parte No. 575**
Review of Rail Access and Competition Issues	)	

COMMENTS OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION AND ENTERGY ARKANSAS, INC. IN SUPPORT OF RENEWED PETITION OF THE WESTERN COAL TRAFFIC LEAGUE FOR RULEMAKING TO ELIMINATE UNREASONABLE "PAPER BARRIERS" TO INTERCHANGE

Arkansas Electric Cooperative Corporation ("AECC") and Entergy Arkansas, Inc. ("Entergy", and together with AECC, "Utilities") respectfully submit their joint comments to the Surface Transportation Board in support of the Renewed Petition of The Western Coal Traffic League for rulemaking to eliminate unreasonable "paper barriers" to interchange.[1]

I. STATEMENT OF INTEREST

AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve approximately 400,000 customers located in each of the 75 counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The largest of AECC's generation assets are its ownership interests in the White Bluff and Independence coal-fired generation plants, each of which typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually. AECC has a 35 percent interest in each of these plants. Entergy is the majority owner and also the operator of these plants.

[1] Renewed Petition submitted March 21, 2005.

Entergy is a public utility subsidiary of Entergy Corporation, an investor owned registered public utility holding company. Entergy and the other public utility subsidiaries of Entergy Corporation serve more than 2,000,000 customers located in Arkansas, Louisiana, Mississippi, and Texas. Entergy is the majority owner and also the operator of the White Bluff and Independence coal-fired generation plants described above. Its affiliate Entergy Gulf States, Inc. owns and operates the Nelson coal-fired generation unit located near Lake Charles, Louisiana, which typically burns in excess of 2 million tons of PRB coal annually.

As operator of White Bluff, Independence, Nelson, and other power plants, Entergy monitors the terms of fuel supply and coal transportation agreements. In discharge of its fiduciary duty to its members with regard to its ownership interest in the White Bluff, Independence and other power plants, and to assure efficiency in the supply of fuel to those plants, AECC also monitors the terms of fuel supply and coal transportation agreements. Through the review of data filed with the Federal Energy Regulatory Commission and other sources, AECC and Entergy each seek to assure that the cost of electric power generation at the plants in which it has an interest is competitive with the cost incurred by other utilities. This is of growing importance as the electric utility industry is becoming open to competition. It is well known, and demonstrated by both experience and FERC data, that coal-fired generation plants with competitive transportation options enjoy more favorable delivered fuel costs than do plants that lack such alternatives.

The White Bluff plant at Redfield, Arkansas formerly had only one option for rail service. It is now served by both the BNSF Railway Company ("BNSF") and the Union Pacific Railroad Company ("UP") as a result of the build-in/build-out condition imposed in the UP/SP merger proceeding,[2] a build-out authorized to implement the merger condition,[3] and an agreement reached between Entergy and UP.

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[2] *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company-Control and Merger-Southern Pacific Rail Corporation Southern Pacific Transportation Company, St. Louis Southwestern Railroad Company, SPCSL Corporation, and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760 (hereinafter *UP/SP)*, Decision No. 44 at 185 (served Aug. 12, 1996); Decision No. 88 (served Mar. 21, 2000).
[3] *Entergy Arkansas and Entergy Rail-Construction and Operation Exemption-White Bluff to Pine Bluff, AR*, STB Finance Docket No. 33782 (served May 4, 2000).

The Independence plant is located on a line of the Missouri and Northern Arkansas Railroad Company, Inc. ("MNA"), a subsidiary of RailAmerica, Inc (formerly known as RailTex, Inc.). MNA operates on this line by virtue of pair of agreements dated December 11, 1992 between MNA and Missouri Pacific Railroad Company ("MP", then a subsidiary of UP)[4] entailing lease and purchase of track in Missouri, Arkansas and Kansas.[5] MNA can interchange traffic not only with UP, but also with BNSF (at Ft. Scott, Kansas, and at Lamar, Carthage, Springfield and Aurora, Missouri)[6] and with The Kansas City Southern Railway Company ("KCS"). However, the agreements with MNA contain "paper barriers" that preclude MNA from participating in—and AECC and Entergy from enjoying-- competitive rail service to the Independence plant.

II. COMMENTS

The MNA/UP lease agreement covers 389 miles of track in Arkansas, Missouri and Kansas. Of particular relevance for these Comments, the lease includes former MP mainline trackage between Pleasant Hill, Missouri and Bergman, Arkansas and between Guion, Arkansas and Diaz Junction, Arkansas, a total distance of 282 miles. The 102-mile gap between Bergman and Guion is covered by a purchase agreement of that same date. Those agreements, which must be viewed as intertwined and therefore interpreted together, provide compensation to UP in the form of (i) $7.5 million for the Guion-Diaz Junction line segment,[7] (ii) a preset division of revenues on jointly handled traffic specified as payment from UP in dollars per carload or per loaded coal train,[8] and (iii) an annual rental payment that varies from $90 million per year to zero, decreasing as the percentage of traffic interchanged by MNA with UP increases from 0-4% to 95-100%.[9] Other economically beneficial terms to UP include a reduction in MNA's revenue

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[4] Prior to 1982, Missouri Pacific ("MP") was a separate Class I railroad. UP acquired control of MP in a transaction that also included the Western Pacific Railroad (ICC Finance Docket No. 30000). MP operated as a subsidiary of UP until 1997, when it was merged into UP.

[5] *See* Exhibit 10.18 to RailTex, Inc. SEC Form S-1 (filed Nov. 19, 1993).

[6] In addition, BNSF has trackage rights on certain UP lines in Arkansas that were granted in the UP/SP merger and intersect the MNA line at Diaz. However, those rights are for overhead traffic only.

[7] Line Sale Contract at § 4.

[8] Lease Agreement at Exhibit E.

[9] Lease Agreement at § 4.03. An excerpt from the MNA/UP agreement showing the rental fee and related interchange percentage ratios may be found at Attachment 3 to the WCTL Renewed Petition.

division on certain traffic effective January 1, 1995,[10] an escalation adjustment factor of 50% of the RCAF-U, subject to a cap of 3.0% per year[11] (a favorable escalation term not seen by many shippers), a right to obtain trackage rights for the Diaz Junction-to-Independence, Arkansas segment - including the right to serve the Independence plant on an exclusive basis - for a payment to MNA of $60,000 per year this right is exercised,[12] and prohibition of interchange with any carrier other than UP at Kansas City.[13] The sale and lease agreements basically relieve UP of the operating and maintenance costs[14] and the common carrier obligation associated with these lines, while leaving UP with virtually total commercial control over all significant actual or potential interline movements.

It is not surprising that UP's private interests favored entry into the lease and sale agreements with MNA. UP retains substantially all of the economic benefits of the lines, and it escapes from maintenance, service and labor responsibilities. The real question is how the public interest benefits from the arrangement. As Vice-Chairman Mulvey recently stated in dissenting from approval of the lease of a line from a Class I railroad to a Class III where the transaction included paper barriers, "...while restrictions on interchange may be in the private interests of two railroads, they nevertheless operate as a restraint of trade and run counter to the public interest."[15]

WCTL's petition articulates important public interest considerations that justify Board investigation of paper barrier issues, and AECC and Entergy support Board involvement on those grounds. AECC and Entergy further believe that there are additional public interest considerations stemming from the Board's merger standards that should lead the Board to now give particularly careful scrutiny to paper barrier issues. As articulated in the discussion of public interest issues contained in the Board's merger rules, "(A)pplicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing

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[10] Lease Agreement at Exhibit E. In addition, an amendment effective March 1, 1993—less than three months after the contract date—cut the division on the Independence movement by over 50%, thereby stripping out a substantial portion of MNA's contribution opportunity from this traffic.
[11] *Id.*
[12] Lease Agreement at § 3.01.
[13] Lease Agreement at Section 5.05.
[14] Lease agreement at § VI.
[15] Buckingham Branch Railroad Company--Lease—CSX Transportation, Inc., (served Nov. 5, 2004) at p. 7.

gateways … and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement."[16]

For coal moving to the Independence plant, the paper barriers under which MNA now operates foreclose viable "competitive and market options" that MNA predecessor MP could and would have provided.[17] While MP would have been the only carrier able to directly serve the plant, its ability to exploit this position would have been limited by options for BNSF-MP routings via junctions south/east of Kansas City. It is AECC's and Entergy's understanding that a BNSF-MP routing via Hoxie, AR (on BNSF's main line between Kansas City and Memphis) would be comparatively more efficient than a BNSF-MP routing via Kansas City.[18] Interchange at Hoxie also would have provided BNSF with a significantly longer haul. Under these circumstances, AECC/Entergy almost certainly could have relied upon BNSF cooperation, and would therefore have been in a position to pursue rate relief for the approximately 43-mile MP segment between Hoxie and the plant.

An independent MP also would provide options for AECC/Entergy to respond to the types of widespread service and operating problems that have become disturbingly routine in recent years. If one of the PRB railroads were to experience service problems as a result of merger integration difficulties, natural disasters, traffic fluctuations, management misjudgments, etc., an independent MP would enable AECC/Entergy to compensate by making greater use of the other PRB railroad.

Paper barriers make it impossible for MNA to replicate the beneficial competitive pressures on rates and service that would have been provided by an independent MP. MNA cannot serve Hoxie at all, and it cannot interchange with BNSF at Kansas City. Even if it could, the terms of its lease economically preclude any significant interchange with BNSF at any location. UP basically acquired a line of railroad that did not fit its

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[16] Title 49, Section 1180.1.c.2.i. The importance of this principle has been reiterated in several merger decisions, including the Board's April 9, 2004 decision in Finance Docket No. 34434 (CN/GLT): "The Board will hold applicants to their pledge that they will waive any defenses they might otherwise have …under the general principle that the Board does not separately regulate bottleneck rates, in circumstances where a shipper prior to the …(T)ransaction would have been entitled to regulation of a bottleneck rate under the Board's "contract exception" to the general rule.

[17] The UP/MP/WP merger was consummated while the Independence plant was under construction.

[18] UP has chosen to incur approximately 120 miles of circuity to move loaded coal trains to the Independence plant via Diaz (rather than via MNA at Kansas City). The Board can reasonably infer that portions of the former MP line between Independence and Kansas City are comparatively inefficient for heavy haul movements.

long-term needs, saddled it with paper barriers that neuter its competitive influences (contrary to the public interest standards articulated in the Board's current merger policy), and then spun it off as an indentured servant.

UP has enjoyed the fruits of this situation for more than a decade. It is well time for the Surface Transportation Board to review its policies concerning paper barriers and to evaluate paper barriers—including those faced by MNA—under a public interest standard. Adoption of the policy and procedure proposed by the Western Coal Traffic League would well serve the public interest and the Board's statutory responsibilities.

III. RELIEF REQUESTED

Arkansas Electric Cooperative Corporation and Entergy Arkansas, Inc. respectfully request the Surface Transportation Board to initiate a rulemaking to consider amending its policies and procedures for evaluating paper barriers to interchange, and to adopt such policies and procedures as recommended by the Western Coal Traffic League, and thereafter to entertain requests for review of paper barriers upon request of an interested shipper or rail carrier.

Respectfully submitted,

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May 2, 2005

<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that a copy of the foregoing COMMENTS is being served by hand upon petitioner as follows:

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